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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1991	)	MM Docket No. 92-259
	)	
Broadcast Signal Carriage Issues	)	

To: The Commission

COMMENTS OF VIACOM INTERNATIONAL INC.

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List A B C D E

TABLE OF CONTENTS

Page

SUMMARY iii

COMMENTS OF VIACOM INTERNATIONAL INC. 1

I. INTRODUCTION. 2

II. THE ACT DOES NOT AUTHORIZE A CABLE OPERATOR TO ABROGATE ANY EXISTING CABLE NETWORK AFFILIATION AGREEMENTS 7

III. RETRANSMISSION CONSENT. 21

A. The FCC's Proposed Implementation of the Act's Retransmission Consent Provisions Will Produce Incongruous Results Not Intended by Congress. 21

1. Cable Systems May Carry Distant Signals Without Obtaining Retransmission Consent. 23

2. The FCC's Exclusivity Rules Should Not be Applicable to Retransmission Consent Stations Not Carried by Local Cable Systems. 36

3. A Television Station's Retransmission Consent Election Should be Applicable to All Cable Systems in the Station's Arbitron ADI Market . 44

B. The FCC Should Require a Local Commercial Television Station, as a Condition to Exercise of Retransmission Consent Rights, to Provide a Cable System with a Written Certification of Its Express Authority to Grant Retransmission Consent and Declare that Cable Systems that Rely on Such Certifications Have All Authority Required Under the Act for Retransmission Consent. 49

C. The FCC Should Declare That a Local Commercial Station May Not Grant Retransmission Consent Unless Its Programming and/or Network Affiliation Contracts Expressly Allow It to Do So and that One Need Only Look to the Contracts the Station Has Entered Into with its Video Programmers to Determine Whether the Station Has Authority to Grant Retransmission Consent. 51

D. The FCC Should Implement Retransmission Consent and Must-Carry by Adopting Election Requirements that Will Permit Cable Operators to Minimize Costs and Prevent Disruption to Cable Service. 56

E. The FCC Must Fully Account for Retransmission Consent Costs When Establishing a "Reasonable Rate" for Basic Cable Service. 60

IV. MUST-CARRY. 61

A. Substantial Duplication Standard for Noncommercial and Commercial Stations. 61

1. Noncommercial Stations. 61

2. Commercial Stations. 65

B. Cable Systems Serving Communities in More than One Television Market and Changes in ADI's. 66

V. CONCLUSION. 68

SUMMARY

Viacom International Inc. ("Viacom"), a diversified entertainment company which owns cable systems and television stations, operates cable programming services, and syndicates and produces television programming, will be affected substantially by the provisions in the Cable Television Consumer Protection and Competition Act of 1992 (the "Act") pertaining to must-carry and retransmission consent. Hence, Viacom is filing these Comments in an effort to ensure that any must-carry and retransmission consent rules the FCC adopts in this proceeding (i) are consistent with the language and intent of the Act; and (ii) prevent unnecessary disruption to the service currently provided to cable subscribers.

Viacom urges that the FCC declare that the must-carry provisions of the Act do not authorize a cable operator to abrogate any existing affiliation contract it has with a cable network. Viacom submits that where a television station's must-carry rights conflict with the cable network's existing contractual rights, nothing in the Act authorizes the cable operator to abrogate the affiliation contract in order to comply with the Act's must-carry provisions or the FCC's must-carry rules. Indeed, Congress' removal of statutory language which would have preempted existing affiliation contracts confirms that Congress did not intend for the Act's must-carry provisions to authorize abrogation of those contracts. Viacom further submits that interpreting the Act as allowing cable operators to abrogate

existing affiliation contracts would be contrary to principles of statutory interpretation and to the general disposition throughout of the Act against overriding existing contracts, would raise serious constitutional issues of due process and, as a practical matter, would create a potential morass of contract litigation which clearly would not serve the public interest.

In addition, Viacom submits that in certain respects the FCC's proposed implementation of the Act's retransmission consent provisions will produce incongruous results wholly inconsistent with the intent of Congress. Specifically, the FCC appears to have concluded that a commercial television station which is "distant" under the Act is entitled to exercise retransmission consent rights. This interpretation is inconsistent with both the language and legislative history of the statute, particularly in view of the language in Section 325(b)(3)(B) specifying that the FCC regulations implementing retransmission consent <u>shall require</u> televisions stations to elect between retransmission consent and must-carry. Since distant signals, which have no must-carry rights, are statutorily incapable of making such an election, retransmission consent rights cannot be available to them. Any other interpretation also accords entirely too much bargaining power to local stations (particularly local network affiliates) in retransmission consent negotiations and converts the Congressional "must-carry <u>or</u> pay" scheme to a "must-carry <u>and</u> must pay" scheme.

Moreover, the FCC has not addressed in the Notice of Proposed Rulemaking whether a local commercial television station which elects retransmission consent, but is not carried, could under the FCC's rules exercise program exclusivity rights and thereby prevent a cable system from providing identical programming to its subscribers via retransmission of the signal of a distant station. In addition, the FCC appears to have interpreted the Act's "same election" requirement to mean that a local station is entitled to make different must-carry/retransmission consent elections simultaneously on different cable systems within its ADI unless the service areas of those systems directly overlap. Viacom submits that the FCC's position on the "same election" requirement, its silence on the exclusivity question, and its conclusion that distant signals have retransmission consent rights will have the collective effect of denying broadcast programming to some or all cable subscribers in a given ADI, a result clearly not intended by Congress.

Viacom also requests clarification of certain other issues relating to the Act's retransmission consent provisions. Specifically, Viacom asks the FCC to (i) require a local station electing retransmission consent to provide a cable system with a written certificate signed by the station stating that it has express authority from its video programmers to grant retransmission consent and (ii) to declare that such certification provides the cable system with all authority it requires under Section 325 of the Act. Viacom also urges that, since retransmission consent is a matter of communication law and not copyright, the FCC declare that for purposes of determining whether a station has retransmission consent rights, one need only look to the contract between the station and its video programmer (whether it be a syndicator or a broadcast network) and not to any agreements with any other party. Further, Viacom asks the FCC (i) to declare that a local station may not grant retransmission consent unless its contracts with video programmers expressly allow it to do so, and (ii) to implement the initial and triennial retransmission consent and must-carry election dates so as to minimize cable operator costs, allow cable operators sufficient time to comply with any federally or locally imposed notice requirements, and otherwise mitigate any potential disruption to cable service. Viacom also asks that the FCC fully account for retransmission consent costs when establishing a "reasonable rate" for basic cable service.

As to the implementation of must-carry, Viacom asks the FCC to declare that any noncommercial station will "substantially duplicate" another noncommercial station's programming if it has broadcast over a specified period of time at least 50% of the other station's programming either in prime time (as defined in Section 76.662 of the FCC's Rules) or during the entire broadcast day. Viacom also asks the FCC to declare that a commercial television station will be deemed to substantially duplicate another commercial television station (network or independent) if it has broadcast at least 50% of the other station's prime time or entire broadcast day's programming during the immediately preceding sweeps period. Viacom submits that the high network clearances and other programming strategies employed by commercial stations during sweeps periods will provide an accurate measure of the amount of duplication between commercial stations. Finally, Viacom requests that the FCC allow a cable system serving subscribers *in more than one* ADI to treat the entire system as located in the market where the system has the largest number of subscribers.

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COMMENTS OF VIACOM INTERNATIONAL INC.

Viacom International Inc. ("Viacom") herein comments on the FCC's Notice of Proposed Rule Making ("NPRM")[1/] in the above-captioned proceeding. Viacom is a diversified entertainment company with operations in several industry segments that will be impacted substantially by any rules adopted in this proceeding. Viacom owns and operates cable television systems serving subscribers in and around, inter alia, San Francisco, California; Seattle-Tacoma, Washington; Nashville, Tennessee; and Dayton, Ohio.[2/] Viacom also owns and operates satellite-delivered cable programming services,[3/] including Showtime, The Movie Channel,

1/ FCC 92-499 (released November 19, 1992).

2/ Viacom also operates cable systems serving subscribers in and around Salem, Oregon; and Redding, Petaluma, Oroville, Colusa County and Healdsburg, California.

3/ Throughout these Comments, references are made at various places to "cable programmers," "cable programming services," and "cable networks." The use of the term "cable" in these descriptions results from the context of this proceeding, which concerns carriage of programs on cable systems, and is not intended to imply that these programming services or networks are exclusively disseminated by cable.

MTV, Nickelodeon, and VH-1. Viacom owns and operates television stations in the St. Louis, Missouri; Hartford, Connecticut; Albany and Rochester, New York; and Shreveport, Louisiana television markets. Finally, Viacom is engaged in the syndication of feature film, first-run, and off-network programming to, inter alia, television stations and in the production of, inter alia, both network and first-run television programs. The comments set forth below therefore reflect a broad perspective of interests that will be affected in different ways by whatever rules the FCC adopts.

I. INTRODUCTION.

Under the retransmission consent provisions of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Act" or the "Act"), a local commercial television station must by October 6, 1993, and once every three years thereafter, elect between cable carriage of its signal pursuant to the Act's must-carry provisions or pursuant to a retransmission consent agreement between the station and the affected cable system(s). 47 U.S.C. Section 325(b)(1). Section 614 of the Act, with certain limited exceptions, requires a cable system to carry the signal of any "local commercial television station," i.e., a commercial television station within whose Arbitron Area of Dominant Influence ("ADI") the system is located. Also, Section 615 of the Act, with certain limited exceptions, requires a cable system to carry the signal of any "qualified local noncommercial television station," i.e., a noncommercial station whose community of license is within 50 miles of the system's principal headend or whose Grade B contour encompasses the system's principal headend. In this proceeding, the FCC proposes to adopt rules which (i) clarify and implement the Act's retransmission consent provisions for commercial television stations; (ii) clarify and implement the Act's must-carry provisions for commercial television stations; and (iii) clarify and implement the Act's must-carry provisions for noncommercial stations.[4/]

As noted above, Viacom or its subsidiaries operate cable systems in and around several major television markets, most of which are served by a large number of television stations. For instance, Viacom subsidiaries operate cable systems in the San Francisco-Oakland-San Jose ADI, where there are seventeen operating commercial television stations and five operating noncommercial television stations.[5/] Viacom subsidiaries also operate cable systems in the Seattle-Tacoma ADI, where there are nine operating commercial television stations and three operating

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[4/] The Act's retransmission consent and must-carry provisions are being challenged in Turner Broadcasting System, Inc. v. FCC, Civil Action No. 92-2247 (D.D.C., filed October 5, 1992), and consolidated cases, on the grounds, *inter alia*, that the Act impermissibly interferes with the First Amendment rights of cable operators to select, position, and package the programming they provide to their subscribers. Viacom supports the constitutional challenges being made therein. Accordingly, these Comments are being submitted without prejudice to Viacom's position that the retransmission consent and must-carry provisions of the Act are unconstitutional.

[5/] 1992 Broadcasting & Cable Market Place at E-80.

noncommercial television stations.[6] Since each of Viacom's systems provides programming to its subscribers from superstations,[7] satellite-delivered cable programming services, pay-per view services, and public access and local origination channels, and since some also carry distant signals that are not superstations, and further in view of the fact that most of Viacom's systems are saturated (i.e., have no unused channel capacity), the channel additions, deletions and realignments that will likely be required under the Act's must-carry provisions will require deletion of some program offerings and realignment of the channels on which others are carried. These deletions and realignments will substantially disrupt the cable service Viacom provides to its subscribers.

Viacom urges in these Comments that the FCC declare that the Act does not preempt or modify the provisions and contractual requirements of existing program affiliation agreements between cable operators and cable networks. For the reasons discussed in Section II, infra, the Act should not be construed as authorizing such retroactive application of its provisions, and such

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6/ Id. at E-81.

7/ The term "superstation," as used throughout these Comments, means the signal of any independent television broadcast station that was, as of May 1, 1991, secondarily transmitted by satellite beyond the local service area of such station. This definition is consistent with the definition of "superstation" set forth in the Satellite Home Viewers Act of 1988, 17 U.S.C. Section 119(d)(9), to which Section 325(b)(2) refers for definitions of terms used in Section 325(b)(2).

retroactive application in any event would raise serious constitutional problems.

Further, Viacom submits that in certain respects the FCC's proposed implementation of the Act's retransmission consent provisions will produce incongruous results wholly inconsistent with the intent of Congress. First, the FCC appears to have concluded that a commercial television station which is "distant" under the Act, i.e., is located outside of the ADI in which a cable system operates and is not a superstation, is entitled to exercise retransmission consent rights. Second, the FCC does not address the issue of whether a local commercial television station which elects retransmission consent, but is not carried, could exercise exclusivity rights and thereby prevent a cable system from providing identical programming to its subscribers via retransmission of the signal of a distant station. Finally, the FCC appears to have concluded that a local station is entitled to make different must-carry/retransmission consent elections simultaneously on different cable systems within its ADI, unless the service areas of those systems directly overlap. The collective effect of these proposals will be the denial of both broadcast and cable network programming to some or all cable subscribers in a given ADI, a result clearly not intended by Congress, and invidious discrimination between subscribers to different cable systems in the same ADI. Accordingly, in Section III of these Comments, Viacom argues for interpretations of the Act which more accurately reflect the Act's language and legislative history and which will avoid the incongruous results described above. In addition, Viacom requests that the FCC:

> (i) Require a local station electing retransmission consent to provide a cable system with a written certificate signed by the station stating that it has express authority from its video programmers to grant retransmission consent and declare that cable systems that receive such station certifications have all authority required under the Act to retransmit any programs covered by such certifications;
>
> (ii) Declare that, in determining whether a television station has the requisite authority to grant retransmission consent to cable systems, the only relevant agreement is the agreement between the station and its video programmers;
>
> (iii) Declare that a local station may <u>not</u> grant or withhold retransmission consent unless its programming and/or network affiliation contracts expressly allow it to do so;
>
> (iv) Implement retransmission consent and must-carry so as to minimize cable operator costs and potential disruption to cable service; and
>
> (v) Fully account for retransmission consent costs when establishing a "reasonable rate" for basic cable service.

Viacom also asks the FCC to declare that, for purposes of must-carry, any noncommercial television station will "substantially duplicate" another station's programming, and therefore will in most instances not have to be carried, if it has broadcast over a specified period of time at least 50% of the other station's programming either in prime time (as defined in Section 76.662(g) of the FCC's Rules) or during the entire broadcast day. In addition, Viacom asks the FCC to declare that a commercial station (network or independent) will be deemed to substantially duplicate another commercial station's programming if during the immediately preceding "sweeps" period it broadcast at least 50% of the other station's programming in prime time (as defined in Section 73.662(g)) or during the entire broadcast day. Finally, Viacom requests that the FCC allow a cable system serving subscribers in more than one ADI to treat the entire system as located in the market where the system has the largest number of subscribers.

II. THE ACT DOES NOT AUTHORIZE A CABLE OPERATOR TO ABROGATE ANY EXISTING CABLE NETWORK AFFILIATION AGREEMENTS.

The Act is silent as to how its must-carry requirements affect a cable operator's obligations under existing affiliation agreements it may have with satellite-delivered cable networks. Those agreements typically specify the license fees the parties have agreed upon and require that the cable operator carry the cable network for a given length of time, perhaps on the basic tier (and perhaps even on a specific channel). For the reasons set forth below, Viacom submits that the FCC has no authority under the Act to adopt must-carry rules which authorize a cable operator to abrogate existing affiliation agreements.

The legislative history of the Act demonstrates that Congress removed from the Act provisions contained in earlier legislative proposals which sought to preempt existing affiliation agreements between cable operators and cable networks. Section 623(b)(3) of the 1990 Senate version of the

Act, S.1880, entitled the Cable Television Consumer Protection Act of 1990, stated:

> A cable operator may add to or delete from a basic cable service tier any video programming other than retransmitted local television broadcast signals. Any obligation imposed by operation of law or contract inconsistent with this subsection is preempted and may not be enforced.

S.1880, 101st. Cong., 2d. Sess., Section 623(b)(3) (1990).

Similarily, Section 623(b)(4) of the 1990 House version of the Act, H.R.5267, entitled the Cable Television Consumer Protection and Competition Act of 1990, preempted any franchise obligation or programming contract which required the cable operator to add any video programming to the basic tier, other than must-carry stations and PEG channels required by the operator's franchise and certain nationally distributed non-profit public and government affairs cable networks. H.R.5267, 101st Cong., 2d. Sess., Section 623(b)(4) (1990). Section 623(b)(4) also provided that a programming contract that required carriage on the basic service tier, or that established a rate for carriage (as part of the basic service tier), could not be enforced unless the contract was applied to require carriage of the subject programming on the next most widely subscribed level of service. Id.[8/]

[8/] Similarly, the Report by the Senate Committee on Commerce, Science and Transportation (the "Senate Committee") on S.1880 stated that "[i]f a contract . . . is abrogated and such contract requires carriage on the basic service tier or its equivalent, the Committee intends that the obligations undertaken pursuant to (continued...)

The 1991 House version of the Act, H.R.1303, retained H.R.5267's preemption language. However, when it was introduced, the 1991 Senate version of the Act, S.12, modified Section 623(b)(3) (as it had appeared in S.1880) to read as follows:

> A cable operator may add to or delete from a basic cable service tier any video programming other than retransmitted local television broadcast signals. Any obligation imposed by operation of law inconsistent with this subsection is preempted and may not be enforced.

S.12, 102d Cong., 1st Sess., Section 623(b)(3) (1991). Significantly, this modification of S.1880 deleted the phrase "or contract," thereby eliminating S.1880's preemption of existing contracts between cable operators and cable networks, and limiting the preemption to local laws or regulations which imposed impermissible carriage requirements. Moreover, the corresponding provision in the 1992 House version of the Act, H.R.4850 (which was substituted for H.R.1303 when the House Committee on Energy and Commerce reported the bill), eliminated preemption of franchise obligations and programming contracts altogether. Section 623(b)(2)(B) of H.R.4850 stated:

> A cable operator may add additional video programming signals or services to the basic service tier. Any such additional signals or services provided on the basic service tier shall be provided to subscribers at rates determined under paragraph (1)(A).

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[8](...continued)
such contract shall require carriage on the next most widely subscribed to tier of service." S.Rep. No. 101-381, 101st Cong., 2d. Sess. at 60 (1990).

H.R.4850, 102d Cong., 2d. Sess., Section 623(b)(2)(B) (1992). The House-Senate Conference Committee ultimately incorporated substantially the same language into the final version of the Act. See 47 U.S.C. Section 543(b)(7)(B). Hence, the Act's legislative history demonstrates that the absence of any language in the final version of the Act preempting cable operator/cable network affiliation contracts was not a product of oversight. Rather, Congress removed provisions from earlier versions of the Act which would have expressly preempted such contracts.

Even if there were no such clear indication of Congressional intent, any FCC rules authorizing abrogation of existing affiliation agreements (i.e., those which were entered into prior to October 5, 1992 and which remain in force) would amount to retroactive application of the Act to private contracts. It is well settled that courts disfavor retroactive application of a federal statute in the absence of an express directive from Congress:

> Retroactivity is not favored in the law. . . . Thus congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. . . . By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.

Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988) (citations omitted). Congress did not in the text of the Act state that the Act's must-carry provisions preempt or modify any existing affiliation agreements between cable operators and cable programming services; nor did it state that the FCC could adopt must-carry rules which could have the effect of preempting or modifying such agreements. The absence of such a provision even without the removal of the preemption language discussed above cannot be read to imply Congressional intent to authorize preemption or modification in view of the rule of statutory interpretation articulated in Bowen.

In fact, there are provisions of the Act which expressly provide for grandfathering of other types of existing contracts. Section 614(b)(10)(C), for instance, provides that a cable operator may continue to receive carriage payments from a local commercial television station until the expiration of any governing agreement entered into prior to June 26, 1990. Similarly, Section 628(h) states that, with one exception dealing with unserved areas, nothing in the program access provisions of the Act "shall affect any contract that grants exclusive distribution rights . . . . that was entered into on or before June 1, 1990." In addition, the Senate Committee stated that the retransmission consent provisions of S.12 (the "Senate Bill") were not intended to abrogate or alter existing program licensing agreements between broadcasters and program suppliers. S.Rep. No. 102-92 ("Senate Report"), 102d Cong., 1st Sess. at 36 (1991). The Senate Bill was amended on the Senate Floor to include in Section 325(b)(6) language reenforcing the language in the Senate Report by specifying that nothing in Section 325(b), which provides for retransmission consent, shall be construed as "affecting existing or future video programming licensing agreements between broadcasting stations and video programmers." These provisions suggest that Congress was aware of the Act's possible effect on exiting contracts generally, and that it did not intend for the Act to preempt or modify any rights bargained for under existing contracts.

Furthermore, if the FCC interprets the Act's silence about existing contracts in Sections 614 and 615 as authorizing a cable operator to abrogate an existing affiliation contract in order to comply with the Act's must-carry provisions, then the Act's silence on conflicts with franchise provisions would also authorize a cable operator to abrogate any franchise provisions which require delivery of any service, including PEG channels and other services not mandated by the Communications Act which occupy a channel that could otherwise be used to comply with Sections 614 and 615 of the Act. Viacom submits that there is no basis for treating the impact of must-carry on franchise-related requirements and affiliation contracts differently.[9/] Moreover, any different treatment between the two would raise serious constitutional issues because agreements between cable operators and franchising authorities would then be accorded a preferential

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[9/] In fact, the House Committee on Energy and Commerce (the "House Committee") stated that it did not intend to modify the terms of any franchise provision concerning the carriage of PEG channels. H.R. Rep. No. 102-628 ("House Report"), 102d Cong., 2d. Sess. at 85 (1992).

position in relation to agreements between cable operators and programmers. See, e.g., Police Department of Chicago v. Mosley, 408 U.S. 492 (1972).

Even if the Act could somehow be read as preempting or modifying existing affiliation contracts between cable operators and cable networks, there are serious constitutional implications to any retroactive application of the Act to those contracts:

> Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions. For this reason, "[t]he retroactive aspects of [economic] legislation, as well as the prospective aspects, must meet the test of due process": a legitimate legislative purpose furthered by rational means.

General Motors Corp. v. Romein, ____ U.S. _____, 112 S.Ct. 1105, 1112 (1992), quoting Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 730 (1984) (brackets in original).

Generally, retroactive economic legislation is upheld as a method of spreading costs among the parties who have benefited from the activity that led to the costs being incurred, and not as a method of abrogating contractual rights bargained for in anticipation of future performance. In cases where such legislation is upheld, Congress, either for economic or social reasons, or simply out of a sense of fairness, deemed it necessary to spread the costs retroactively among the benefited parties. The retroactivity of the legislation in these situations, however, did not interfere with bargained-for benefits expected to be received in the future; it simply allocated the costs of doing business among all those who Congress thought should rightfully bear those costs. For example, in U.S. v. Sperry Corp., 493 U.S. 52 (1989), the Supreme Court upheld a section of the Foreign Relations Authorizations Act requiring reimbursement of the government's arbitration fees by entities receiving awards prior to enactment of the statute. In so doing, the Court ruled that retroactive application of the statute was justified by a rational legislative purpose, since it ensured that all successful claimants before the arbitrator would be required to make payments toward the costs of the arbitrator. See also National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co., 470 U.S. 451 (1985); Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976).

None of these situations is comparable to the modification of ongoing relationships between cable operators and cable networks, and the reliance interests predicated on them, that would occur if must-carry obligations are construed to preempt or modify the provisions of existing contracts with video programmers. A cable network takes many factors into account when negotiating with a cable operator over the license fee. The most important of these factors both for networks provided to subscribers for a per channel charge ("pay cable networks") and other networks ("basic cable networks") is the revenue the network expects to receive under the affiliation contract. The amount of revenue is dependent upon a variety of factors, including the number of systems committed to carrying the network, the number of subscribers served by those systems, the duration of carriage, and the tier of service the cable operator and cable network have agreed upon. The revenues the cable network expects to receive under the affiliation contract will determine in large part what license fees the network will agree to pay to its program suppliers. If a cable operator is authorized under the Act's must-carry provisions to remove or retier a cable network in abrogation of its affiliation contract, then potentially the entire basis for the economic relationship between the operator and the network will be severely impaired, since removal or retiering necessarily impacts each of the above-described factors which determine the amount of revenue the cable network will receive under the contract. Yet, the cable network must continue to meet its commitments entered into on the basis of a contract it had every legitimate expectation would not be abrogated.

Furthermore, a basic cable network also derives revenue from advertisements carried during the course of the network's programming. Advertising revenue is dependent upon the number of viewers the network actually reaches and expects to reach by virtue of its affiliation with the cable operator. Often basic cable affiliation agreements will require carriage on the most widely-distributed tier or will impose different terms for carriage on another tier, since carriage on another tier may not deliver the audience share which is the predicate for the network's economic relationships with advertisers and programming sources.

Hence, retroactive application of the Act to ongoing affiliation contracts raises serious questions whether the Act meets the rationality requirement mandated by cases such as General Motors, supra. Viacom submits that an appropriate standard for reviewing the rationality of retroactive application of the Act to agreements for future economic benefits (as opposed to allocation of costs among those who have already received economic benefits) is the Nachman test, under which courts look at four factors: (1) the reliance interests of the parties affected; (2) whether the impairment of the private interest is affected in an area previously subjected to regulatory control; (3) the equities of imposing the legislative burdens; and (4) the inclusion of statutory provisions designed to limit and moderate the impact of the burdens. Nachman Corp. v. PBGC, 592 F.2d 947, 960 (7th Cir. 1979), aff'd on other grounds, 446 U.S. 359 (1980).[10/]

[10/] In Pension Benefit, supra, the Supreme Court rejected the constitutional underpinnings of the Nachman test as applied to cases where the retroactive legislation affects economic benefits and burdens, but left open the possibility that there might be other circumstances under which the four Nachman factors might be relevant. Pension Benefit at 727, n.1. Viacom submits that the due process and First Amendment implications of retroactive application of the Act to affiliation contracts at least renders the four Nachman factors relevant for the purpose of determining (continued...)

As to the first factor under Nachman, the reliance interests of the parties, Viacom submits that, as shown above, cable networks have relied in dealing with third parties upon the promises and representations made by cable operators when negotiating existing affiliation agreements. Both types of networks - - pay and basic cable - - have relied upon revenues they expect to earn under these agreements in establishing the levels of their own commitments to meet programming and other costs.

The second Nachman factor, the prior presence of regulatory control of the activity involved, also weighs against preemption of existing affiliation contracts, since neither the carriage rights established in such contracts nor the cable network's other economic relationships which depend upon carriage have been previously subject to any federal regulatory control.

The third Nachman factor, the equitable considerations involved in adopting retroactive legislation, weighs against preemption as well. The FCC should not underestimate the potential disruption to a pay cable network if the FCC allows existing affiliation agreements to be abrogated. Once an affiliation agreement is abrogated to allow a pay cable network to be removed from a cable system or moved to another level of

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[10/] (...continued)
whether retroactive application of the Act is constitutional. Since, as set forth below, all four of the Nachman factors militate against retroactivity, the Nachman tests in combination are sufficient to show that retroactive application here would deny due process.